No. 85-288

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

JACK DEANE and JOSEPH DEANE,

Petitioners,

vs.

THOMSON McKINNON SECURITIES INC., PEAT, MARWICK, MITCHELL & CO. and MEDICAL AND BUSINESS FACILITIES (A Louisiana Limited Partnership),

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD J. BOYLE
Attorney for Thomson McKinnon Securities Inc.
420 Lexington Avenue
New York, New York 10170

Of Counsel:
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
THOMAS R. MANISERO
EDWARD A. SMITH

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the court of appeals acted properly in affirming the district court's dismissal of Petitioners' second amended complaint with prejudice after Petitioners had failed, in their complaint, amended complaint and second amended complaint, adequately to plead a cause of action upon which relief can be granted and after the district court, in dismissing the two prior complaints, had put Petitioners on plain notice of the deficiencies of each complaint and had given Petitioners opportunities to correct those deficiencies.

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JACK DEANE and JOSEPH DEANE,

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-against-

THOMSON McKINNON SECURITIES INC., PEAT, MARWICK MITCHELL & CO. and MEDICAL AND BUSINESS FACILITIES (A Louisiana Limited Partnership),

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent Thomson McKinnon Securities Inc. ("Thomson McKinnon") respectfully submits this brief in opposition to Jack Deane's and Joseph Deane's petition for a

writ of certiorari to review the order and judgment of the United States Court of Appeals for the District of Columbia Circuit that was entered on May 8, 1985.

STATEMENT OF THE CASE

Ostensibly on behalf of themselves and all others similarly situated, Petitioners commenced this action on or about April 18, 1983, alleging in an entirely conclusory fashion that they had been defrauded, in violation of the federal securities laws, in connection with their purchase of bonds issued by the New Orleans Hospital Corporation (the "Hospital") during its 1981 offering of $10 million in revenue bonds (the "1981 Offering").

Originally named as defendants were Thomson McKinnon, the underwriter for the 1981 Offering, Peat, Marwick, Mitchell & Co. ("Peat, Marwick"), an accounting firm that prepared and provided a feasibility study in connection with the 1981 Offering,

and the Hospital. Although the bases, if any, of Petitioners' allegations remain unclear, Petitioners apparently contend that Thomson McKinnon and Peat, Marwick materially misrepresented the condition, financial and otherwise, of the Hospital. Specifically, Petitioners contend, among other things, that the June 14, 1981 official statement (the "Official Statement") provided to them in connection with their purchase of the Hospital bonds was false and misleading.

The district court permitted Petitioners three attempts to plead an adequate cause of action. Each time they fell woefully short of stating any cognizable claim against Thomson McKinnon, Peat, Marwick, or any other defendant. After Petitioners' third futile attempt,

the district court, with more than adequate legal basis, dismissed Petitioners' second amended complaint with prejudice.

Petitioners' original complaint (the "Complaint") and their amended complaint (the "Amended Complaint")[1] were egregiously insufficient documents that wholly failed to provide adequate notice to the defendants of the claims against them. The Complaint contained only six paragraphs of substantive allegations, despite the fact that it purported to claim fraud against three separate defendants, and failed even

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1 In these complaints, Petitioners alleged, among other things, violations of Section 17(a) of the Securities Act of 1933, (the "Securities Act"), 15 U.S.C. § 77q(a), and Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78(j).

to enumerate the provisions of the federal securities laws that allegedly were violated.

The Amended Complaint wholly failed, as did the Complaint, to specify the statements constituting the alleged fraud, the parties and/or persons that made the statements, or the circumstances under which the statements allegedly were made. Once again, Petitioners relied solely upon conclusory allegations and provided absolutely no basis for their claims.

Accordingly, on August 11, 1983 and February 9, 1984, respectively, the district court dismissed the Complaint and the Amended Complaint. Both times, the district court dismissed Petitioners' action without prejudice, permitting them a

third opportunity to plead an adequate cause of action.

On March 1, 1984, nearly a year after they first commenced this lawsuit, Petitioners filed their second amended complaint (the "Second Amended Complaint"). Despite the district court's two prior admonitions, Petitioners continued in their Second Amended Complaint to employ the conclusory and unsupported allegations and bald recitations of statutory language that plagued their earlier pleadings. As the district court observed:

> The plaintiffs' present effort, as was true of the two earlier pleadings, is still lacking and deficient. Most notably, they fail to assert what portions, if any, of the Official Statement are false or misleading and in what manner. They fail to particularize or specify what statements are actionable as to a defendant and fail to provide

> sufficient factual predicate to support a securities fraud claim as to a defendant. They continue to rely upon conclusory allegations and a mere recitation of the language of the two federal securities statutes in their pleading.

(A. 7-8).[2]

Accordingly, on April 30, 1984, the district court, in a nine page Memorandum Opinion, dismissed the Second Amended Complaint with prejudice and noted: "[t]he Deanes have been advised more than once what is required to state a securities fraud claim and have had ample opportunity to comply. Their continual difficulties and inability to satisfy a cause of action perhaps suggest that they do not have a viable cause of action." (A. 15).

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2 References to "(A __)" are to Petitioners' Appendix.

On appeal, the court of appeals held: "For the reasons stated in his opinion of April 30, 1984, we affirm Judge Parker's ruling that the complaint with respect to these Counts did not satisfy the pleadings requirements of Fed. R. Civ. P. 8(a) and 9(b). [citation omitted]. In affirming, we expressly do not decide whether a private civil action for damages can be brought under Section 17(a)." (A. 2).

In sum, Petitioners were afforded three opportunities adequately to plead a cause of action against Thomson McKinnon and Peat, Marwick. After each of the first two failed attempts, the district court delineated the deficiencies of the pleading at issue and the action required to remedy those deficiencies. Nevertheless, Petitioners failed equally in their third

attempt. Certainly, under these circumstances, the court of appeals acted properly in affirming the district court's dismissal of the Second Amended Complaint with prejudice.

ARGUMENT

I

THE COURT OF APPEAL'S AFFIRMANCE OF THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' SECOND AMENDED COMPLAINT WAS ENTIRELY PROPER AND IN CONFORMITY WITH THE LAW

Utilizing inapposite precedent, Petitioners argue that the court of appeals acted contrary to law in affirming the district court's dismissal of the Second Amended Complaint with prejudice. Since the court of appeal's affirmance was wholly in conformity with the Federal Rules of Civil Procedure and with well established legal precedent, Petitioners' argument must fail.

In support of their argument, Petitioners rely on a single case recently decided by this Court: Herman & MacLean v.

Huddleston, 459 U.S. 375 (1983). Quoting various verbatim statements in Justice Marshall's opinion out of context, Petitioners apparently question entirely the basis and legality of the specificity requirements imposed by Rule 9(b) of the Federal Rules of Civil Procedure ("Rule 9(b)"). Huddleston, however, is entirely inapposite.

Huddleston, a purported class action instituted under Section 10(b), addressed, among other things, "the standard of proof applicable to actions under § 10(b)." Id. at 379. Justice Marshall, noting that this Court traditionally has limited the application of the clear and convincing evidence burden of proof, held that the preponderance-of-the-evidence standard, not the clear and convincing evidence standard,

would govern actions brought under Section 10(b). Thus, in Huddleston, this Court held merely that "if [a securities fraud plaintiff] prove[s] that it is more likely than not that . . . [he was] defrauded, . . . [he] should recover." Id. at 390. Huddleston has absolutely no applicability to the pleading requirements of Rule 9(b).

In fact, Huddleston also intimated this Court's concern that "defendants face the risk of opprobrium that may result from a finding of fraudulent conduct." Id. at 390. It is this concern over the opprobrium that may result from the allegation of fraudulent conduct that Rule 9(b) is designed to address. Rule 9(b), which provides that "[i]n all averments or fraud or mistake, the

circumstances constituting the fraud or mistake shall be stated with particularity," is designed "to protect defendants from the harm that comes to their reputations or to their goodwill when they are charged with serious wrongdoing." Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972).

This Court has acknowledged that the policy expressed in Rule 9(b) is particularly important in securities litigation. In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), Justice Rehnquist explained that a securities law "complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at a trial so long as he may

prevent the suit from being resolved against him by dismissal or summary judgment." Id. at 740. The particularity requirement of Rule 9(b) reduces the possibility of suits where "a plaintiff with a largely groundless claim [will] . . . simply take up the time of a number of people, with the right to do so representing an in terrorum increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence."[3] Id. at 741.

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3 One may easily conclude, from the fact that after three attempts over the course of a year Petitioners still cannot plead a sufficient claim, that this lawsuit is frivolous and brought in bad faith.

Despite prior admonitions from the district court to comply with the basic pleading requirements of the Federal Rules of Civil Procedure, Petitioners failed in their Second Amended Complaint, as they had twice previously, to state a cognizable claim against Thomson McKinnon. The Second Amended Complaint was fraught with the same vague and conclusory allegations and bald recitations of statutory language that afflicted Petitioners' two prior complaints. In view of Petitioners' repeated failures to cure the deficiencies by the amendments previously allowed, the court of appeals acted properly in affirming the district court's dismissal of the Second Amended Complaint with prejudice.[4]

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4 Petitioners argue that they should have been permitted discovery in order

(Footnote continued)

(Footnote cont'd from previous page)

to allow them to uncover facts that allegedly would support their fraud claims. This attempt to abuse the discovery process only makes it clearer that Petitioners seek here not to redress a wrong, but to find one.

To permit Petitioners to conduct discovery before they have succeeded in stating any cognizable claim against Thomson McKinnon would be a clear abuse of the discovery process. "Complaints should not be conceived merely as tokens, guaranteeing access to a world of discovery. . . . Neither plaintiff nor his counsel are entitled to roam through a defendant's files at the mere drop of a 'complaint'." Denny v. Barber, 73 F.R.D. 6, 10 (S.D.N.Y. 1977), aff'd, 576 F.2d 465 (2d Cir. 1978). See also Edwards v. Gordon & Co., 94 F.R.D. 584, 586 (D. D.C. 1982).

Moreover, to allow Petitioners to utilize discovery before complying with the requirements of Rule 9(b) would violate Rule 9(b)'s purpose. Rule 9(b) "is designed to require plaintiffs to obtain sufficient information to aver fraud by the time the complaint is filed and to prevent use of the lawsuit as a search for that information." Ross v. Warner, 480 F. Supp. 268 (S.D.N.Y. 1979).

II

THE COURT OF APPEALS ACTED PROPERLY IN DECLINING TO CONSIDER THE AVAILABILITY OF A PRIVATE RIGHT OF ACTION UNDER THE SECURITIES ACT OF 1933

Petitioners argue, erroneously, that the court of appeals acted improperly in failing to decide the issue whether a private civil action for damages can be brought under Section 17(a) of the Securities Act ("Section 17(a)"). The court of appeals, however, did not have to reach that issue. Accordingly, the petition for a writ of certiorari must be denied.

Contrary to Petitioners' assertions, a review of the district court's opinion dismissing the Second Amended Complaint reveals that the district court dismissed

Petitioners' Section 17(a) claim totally because of their failure to comply with the basic pleading requirements of the Federal Rules of Civil Procedure.[5] Since the issue of the availability of a private right of action was therefore not properly before the court of appeals, the court of appeals did not have to reach that issue.

Accordingly, the court of appeals acted properly in expressly not deciding the issue whether a private civil action for damages is available under Section 17(a). The petition for a writ of certiorari therefore must be denied.

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5 Although the district court stated in passing that "[t]he weight of the case authority suggests . . . that an implied right of action is doubtful and unavailable" (A. 10), this statement clearly was intended merely as an observation, and certainly not as a basis for dismissal of the Second Amended Complaint.

CONCLUSION

Having failed in three efforts over the course of a year to plead an adequate cause of action, Petitioners cannot rightfully contend that the court of appeals acted improperly in affirming the district court's dismissal of the Second Amended Complaint with prejudice. Thomson McKinnon therefore respectfully requests that the petition for a writ of certiorari be denied.

Dated: New York, New York
September 19, 1985

Edward J. Boyle
Attorney for Respondent
Thomson McKinnon Securities Inc
420 Lexington Avenue
New York, New York 10170
(212) 490-3000

Of Counsel:

Wilson, Elser, Moskowitz, Edelman & Dicker
Thomas R. Manisero
Edward A. Smith

CERTIFICATE OF SERVICE

I certify that a copy of the attached Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit was mailed, first class mail, postage prepaid on September 19, 1985 to:

A. Fred Freedman, Esq.
Freedman & Cutler, Chtd.
7411 Riggs Road
Suite 216
Hyattsville, MD 20783

Kenneth Meister, Esq.
Cahill, Gordon & Reindel
80 Pine Street
New York, New York 10005

Edward J. Boyle
Counsel for Respondent
Thomson McKinnon Securities Inc.